89-377

No.



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

**INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150, AFL-CIO, and COLIN DARLING,**

*Petitioners,*

vs.

**LOWE EXCAVATING CO.,**

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS SECOND JUDICIAL DISTRICT

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## QUESTION PRESENTED

Whether a state court defamation suit alleging that a labor organization engaged in "false" area standards picketing is preempted by the exclusive jurisdiction of the National Labor Relations Board?

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vs.

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*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS SECOND JUDICIAL DISTRICT

Petitioners, International Union of Operating Engineers, Local 150, AFL-CIO, and Colin Darling pray that a Writ of Certiorari be issued to review a judgment of the Appellate Court of Illinois, Second Judicial District, entered in the above-entitled case on March 3, 1989.

## CITATIONS TO OPINIONS BELOW

The opinion of the Appellate Court of Illinois, Second Judicial District, is reported at 180 Ill.App.3d 39, 535 N.E. 2d 1065 and is presented in its entirety in Appendix A, *infra* at pages A1 through A12. The order of the Illinois

Supreme Court denying the Petition for Appeal as a Matter of Right, or for Leave to Appeal is unreported, but printed in its entirety in Appendix B, *infra* at page A13.

## JURISDICTION

The Appellate Court of Illinois, Second Judicial District, entered judgment on March 3, 1989. The Supreme Court of Illinois denied the Petition for Appeal as a Matter of Right, or for Leave to Appeal on June 1, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

## STATUTE INVOLVED

The statute involved here is the National Labor Relations Act (NLRA), (as amended), §§ 7, 8, 61 Stat. 140, 29 U.S.C. §§ 157, 158. The language of these statutory provisions is set forth in Appendix F, *infra* at page A36 through A41.

## STATEMENT OF THE CASE

### Statement Of Facts

Respondent Lowe Excavating Co. is an Illinois corporation engaged in the excavating and earth moving business (A18; Third Amended Complaint ¶ 1). Local 150 is a labor organization representing employees who operate heavy excavating and earth moving equipment (A19; Third Amended Complaint ¶ 2).

Sometime in 1986 the Company contracted with FAMCO Corp., a general contractor, to do site preparation, excavation and earth moving work at a jobsite in McHenry County, Illinois (A20; Third Amended Complaint ¶ 5). During the fall of 1987 and into the winter of 1988, Local 150 attempted to organize the Company (A20; Third Amended Complaint ¶ 6-7). During that time Company officials told the Union that certain Company employees were paid wages and benefits greater than those paid Union members in the area (A20; Third Amended Complaint ¶ 6). The Company asserts, however, that "beginning in February 1988" it began paying all of its employees wages and benefits equal to the area standard (A24; Third Amended Complaint ¶ 22).

On February 12, 1988, the Union caused a Western Union telegram to be read over the phone to Company officials (A21; Third Amended Complaint ¶ 8). That telegram said that the Union had investigated the Company's compensation policies and determined that it was not meeting the area standard (A21; Third Amended Complaint ¶ 8). The telegram asked the Company to inform the Union if its information concerning the Company's

compensation policies was incorrect; cautioned that failure to maintain the area standards would leave the Union no choice but to take lawful action to preserve those standards; and disclaimed any recognitional objective (A21; Third Amended Complaint ¶ 8).

On February 15, 1988, the Union began picketing the Company at the FAMCO jobsite (A22; Third Amended Complaint ¶ 9). The Union's picket signs read (A22; Third Amended Complaint ¶ 9):

NOTICE TO THE PUBLIC
LOWE EXCAVATING DOES NOT PAY THE PREVAILING WAGES AND ECONOMIC BENEFITS FOR OPERATING ENGINEERS WHICH ARE STANDARD IN THIS AREA

OUR DISPUTE CONCERNS ONLY SUBSTANDARD WAGES AND BENEFITS PAID BY THIS COMPANY

LOCAL 150
International Union of
Operating Engineers, AFL-CIO

The Union continued picketing the jobsite until February 16, 1988 when Company employees and equipment left (A22-A23; Third Amended Complaint ¶ 13-15). On September 28, 1988, the Union picketing resumed for one day (A27; Third Amended Complaint ¶ 31).

**Proceedings In The State Courts**

On February 17, 1988, the Company filed its original Complaint against the Union in the Illinois Circuit Court for the Nineteenth Judicial Circuit. The Company simultaneously moved for a temporary restraining order and preliminary injunction seeking to enjoin the Union's area standards picketing.

On February 19, 1988, the defendants removed the case to the U.S. District Court for the Northern District of Illinois. On June 10, 1988, the District Court, Holderman, J., remanded the case ruling that the original complaint on its face stated no federal claims.

On July 22, 1988, the Company sought and received leave to file its First Amended Complaint with the circuit court. On August 1, 1988, the Union Defendants moved to dismiss the action pursuant to Illinois Code of Civil Procedure § 2-619(a)(1), Ill.Rev.Stat. ch. 110. ¶ 2-619(a)(1). There the Union argued that the circuit court lacked subject matter jurisdiction because resolution of the dispute was within the exclusive primary jurisdiction of the National Labor Relations Board (NLRB) under federal labor law. Meanwhile, on August 4, 1988, the Company filed its Second Amended Complaint; the Union Defendants relied on their motion to dismiss the First Amended Complaint as their response to the Company's Second Amended Complaint as well.

On August 11, 1988, the circuit court began hearing testimony on the Company's Motion For Preliminary Injunction and also entertained argument on the Union's motion to dismiss. Based upon the entire record and that argument, the court granted the Union's motion to dismiss Lowe's Complaint for lack of subject matter jurisdiction. As the circuit court explained, the Company was simply attempting to "cast a preempted dispute into the area of state law by engrafting state court law" upon a federal claim (A16-A17; Report of Proceedings conducted August 11, 1988 at 110-111). Although questioning the Company's ability to reframe the facts presented by the Second Amended Complaint in a manner which would permit the state court to exercise jurisdiction, the court granted Plaintiff leave to file a third amended complaint.

On September 29, 1988, the Company filed its Third Amended Complaint in the circuit court. At that time, the Company also renewed its Motion For Preliminary Injunction. The Union Defendants again opposed the motion and moved to dismiss the Third Amended Complaint as preempted by federal labor law.

On October 11, 1988, the circuit court again heard argument on the parties' renewed motions. At that time, the court granted the Union's motion in part and denied it in part. The court found allegations of libelous non-picketing statements not to be preempted but ruled that the Company's claims based upon the Union's allegedly false area standards picketing were preempted by federal law.

On October 13, 1988, the Company filed its Notice of Interlocutory Appeal in the Appellate Court of Illinois, Second District. The parties fully briefed the issue and on February 14, 1989, the Court entertained argument. On March 3, 1989, the Illinois Appellate Court reversed the circuit court, holding that the Company's state law claims were not preempted by federal law. On April 7, 1989, the Union timely filed its petition for leave to appeal with the Supreme Court of Illinois. On June 1, 1989, the Illinois Supreme Court denied the petition for leave to appeal.

## REASONS FOR GRANTING THE WRIT

### I.

### THE DECISION OF THE ILLINOIS APPELLATE COURT IS IN CONFLICT WITH PREVIOUS DECISIONS OF THIS COURT.

The United States Congress derives its power to preempt state law from the Supremacy Clause of Article VI of the Federal Constitution. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985). In an effort to ensure a uniform national labor policy, federal law preempts the regulation of labor relations by the states. That is, "States may not regulate activities that the [National Labor Relations Act, 29 U.S.C. § 151 *et seq.*] protects, prohibits, or arguably protects or prohibits." *Wisconsin Department of Industry v. Gould*, 475 U.S. 282, 286 (1986). As the Supreme Court ruled in *San Diego Building Trades v. Garmon*, 359 U.S. 236, 245 (1959):

> When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of State interference with national policy is to be averted.

Consequently, the "first inquiry" here is whether "the conduct called into question may reasonably be asserted to be subject to Labor Board cognizance." *Plumbers' Union v. Borden*, 373 U.S. 690, 693-694 (1963).

It is now well settled that picketing which conforms to the NLRB's "area standards doctrine" is protected by Section 7 of the NLRA. *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 206 n. 42 (1978); *Hod Carriers Local 41 (Calumet Contractors Assn.)*, 133 NLRB 512 (1961). As the Board

explained in *Local 741, United Association (Keith Riggs Plumbing and Heating)*, 137 NLRB 1125, 1125-1126 (1962):

> A labor union normally seeks to organize the unorganized and to negotiate collective-bargaining contracts with employers; but it also has a legitimate interest apart from organization or recognition that employers meet prevailing pay scales and employee benefits, for otherwise employers paying less than the prevailing wage scale would ultimately undermine the area standards. Indeed the importance of maintaining area standards as a matter of public as well as union interest was long ago endorsed by Congress by its enactment of the Davis-Bacon Act (40 U.S. Code, Sec, 176a, et seq.) relating to public contracts. It has application, of course, whether or not employees of public contractors are organized or have a collective-bargaining contract.

It is equally well settled that where a union engages in area standards picketing with a recognitional or secondary object, such picketing is prohibited by section 8(b). *See, e.g., Local 3, International Brotherhood of Electrical Workers (Hunts Point Electrical Service)*, 271 NLRB 1580 (1984). Whether protected by § 7 or prohibited by § 8, the Union's conduct is subject to Labor Board cognizance and therefore preempted under *Garmon* and its progeny.

The Illinois Appellate Court acknowledged that the area standards picketing by the Union was activity at least "arguably" protected by Section 7 of the NLRA (A7; slip opinion at 8). That court recognized the federal right of the Union under the NLRB's area standards doctrine to advise the public of an employer's substandard payment of wages and benefits. Nevertheless, the Court held that Lowe's claims fell "within the exception to preemption noted by the United States Supreme Court in *Garmon* and is also not preempted by Federal case law" (A12; slip op. at 13).

Whether area standards picketing can be regulated by state defamation law is a case of first impression. The Illinois Appellate Court's sweeping holding constitutes a dramatic expansion of the *Garmon* exception to the federal preemption doctrine. The ruling allows state court consideration of matters not traditionally subject to state defamation law and permits intrusion into an area of labor relations long considered immune from state regulation. The Union Defendants respectfully submit that they are entitled to review of the Illinois Appellate Court's decision by this Court because it presents a question of fundamental importance to federal labor relations law and is in conflict with previous decisions of this Court.

## II.

## THE DECISION OF THE ILLINOIS APPELLATE COURT TO EXPAND THE EXCEPTION TO THE PREEMPTION DOCTRINE IS AN IMPORTANT QUESTION OF FEDERAL LABOR POLICY WHICH SHOULD BE SETTLED BY THIS COURT.

In *Linn v. United Plant Guard Workers Local 114*, 383 U.S. 53 (1966), the Supreme Court held that malicious libel was conduct akin to intimidation and violence found to be within the exception to preemption under *Garmon*. During the course of a representation election campaign in *Linn*, the Union circulated a leaflet that accused various company officials of "lying" to company employees, alleged that the company had "robbed" them of pay increases, and warned that, "Somebody may go to Jail!" *Id.* at 56. In defining the problem of whether the state court had jurisdiction to remedy false and defamatory statements made during a union organizing campaign, the Court first observed that (*id.* at 58):

> Labor disputes are ordinarily heated affairs; the language that is commonplace there might well be deemed actionable *per se* in some state jurisdictions. Indeed, representation campaigns are frequently characterized by bitter and extreme charges, countercharges, unfounded rumors, vituperations, personal accusations, misrepresentations and distortions. Both labor and management often speak bluntly and recklessly, embellishing their respective positions with imprecatory language.

Nevertheless, while the NLRB might tolerate "intemperate, abusive or inaccurate statements," it does not interpret the NLRA to permit the parties "to injure the other intentionally by circulating defamatory or insulting material known to be false." *Id.* at 61. State court jurisdiction over such claims based on such conduct would not interfere with the NLRB's jurisdiction because (*id.* at 64):

> The Board's lack of concern with the "personal" injury caused by malicious libel, together with its inability to provide redress to the maligned party, vitiates the ordinary arguments for pre-emption. As stressed by THE CHIEF JUSTICE in his dissenting opinion in [*United Automobile Workers v.] Russell*, [356 U.S. 634, 649 (1958)]:
>
> > The unprovoked infliction of personal injuries during a period of labor unrest is neither to be expected nor to be justified, but economic loss inevitably attends work stoppages. Furthermore, damages for personal injuries may be assessed without regard to the merits of the labor controversy . . .
>
> Judicial condemnation of the alleged attack on Linn's character would reflect no judgment upon the objectives of the union. It would not interfere with the Board's jurisdiction over the merits of the labor controversy.

The Court concluded that in light of these considerations "it appears that the exercise of state jurisdiction here would be a 'merely peripheral concern of the Labor Management Relations Act.' " 383 U.S. at 61. It added, "we believe that 'an over-riding state interest' in protecting its residents from malicious libels should be recognized in these circumstances." *Id.*

Relying on *Linn* the Illinois Appellate Court found Lowe's claims here to fit within the exception established by *Garmon*. As the Appellate Court explained (A11; slip opinion at 12):

> The underlying issue in this case is not whether plaintiff paid wages sufficient to meet area standards. The issue is whether defendant, with actual malice, published a statement with knowledge of its falsity, or in reckless disregard for the truth. While truth or falsity is an important element in the tort of trade libel, it is certainly not the only issue to be considered. The issues of injury to reputation and defendant's mental state must also be considered. These issues are of only peripheral concern to the NLRB.

This conclusion is plainly contrary to federal labor policy and controlling case law and should be reversed.

**A. The Illinois Appellate Court's Decision Requires The Trial Court To Decide The Merits Of The Labor Controversy And Thereby Infringes Upon The Exclusive Jurisdiction Of The NLRB.**

The Illinois Appellate Court's statement of the issue and consequent decision understates the concern of the NLRB and is at odds with this Court's previous decisions. In *Linn* the Court was careful to emphasize that underlying the preemption doctrine is the need to prevent state interference with the national labor policy. *Id.* at 59-60, *quoting, Plumbers' Union v. Borden*, 373 U.S. 690 (1963);

*cf., Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 201, n. 31 (1978) (state law trespass suit to enjoin picketing is no threat to primary jurisdiction of NLRB because state court had "no occasion to interpret or enforce" the provisions of the NLRA).

Here, whether the Company is paying its employees wages and benefits equal to the area standard *is* the labor controversy. The NLRB has both the expertise and established case precedent to resolve that controversy. In a dispute over whether an employer pays the area standard, the NLRB will customarily examine the truth of a union's assertion that the picketed employer maintains substandard wages and benefits. Charles J. Morris, ed., 2 *The Developing Labor Law*, 1081 (2d ed. BNA 1983). Furthermore, contrary to the reasoning of the Illinois Appellate Court, resolution of that issue is an essential precondition to a determination of any defamation claim.

Lowe's claims are fundamentally different from those presented in *Linn*, and the other cases relied upon by the Illinois Appellate Court because to determine the truth or falsity of the Union's picketing requires the Court to interpret and apply the Labor Board's area standards doctrine. The rationale underlying the area standards doctrine is that "a union may picket where the labor costs of the picketed employer are alleged by the Union to be below those the Union has established in the area." *Sales Delivery Drivers Local 296 (Alpha Beta Acme Markets, Inc.)*, 205 NLRB 462, 468 (1973). Determining whether a company's labor costs are below the area standard is, therefore, usually much more than a simple arithmetical comparison of wages.

The NLRB's analysis of what goes into the labor cost calculation is a patchwork of decisional law. *See, e.g., Local*

*107 International Hod-Carriers (Texarkana Construction Co.)*, 138 NLRB 102, 103 (1962) (finding valid area standard pickets protesting employer's failure to pay Davis-Bacon wage standard); *Retail Clerks International Association Local 899 (State-Mart, Inc.)*, 166 NLRB 818, 821 (1967) (fringe benefits such as pensions and health and welfare plans are "like wages . . . measurable cost items" subject to area standards protest); *Automotive Employees Local 88 (West Coast Cycle Supply Co.)*, 208 NLRB 679, 680 n. 8 (1974) (seeking information on such "non-cost matters" as seniority and layoff policies irrelevant to question of comparative labor costs therefore inconsistent with area standards goal suggesting unlawful recognitional object); *cf.*, *D.J. Gasaway, Inc. v. Carpenters Local 1889*, 123 LRRM 2669 (N.D. Ill. 1986) (company's apprentice-journeymen ratio one factor in determining union's motive in picketing to enforce area standards). It is this body of NLRB case law which the state courts must necessarily "interpret or enforce" in determining whether the Union falsely accused the Company of failing to pay area standards. To do so, however, presents precisely the interference with the exclusive jurisdiction of the NLRB which the Supreme Court sought to prevent in *Garmon*. Far from being of "peripheral concern" to the NLRB, state court jurisdiction over wage and benefit issues goes to the heart of the Board's mission.

The Illinois Appellate Court's conclusion that the issue of the Union's mental state was only of peripheral concern to the NLRB is likewise erroneous. The NLRB will hold area standards picketing to constitute an unfair labor practice in violation of the NLRA if it finds an organizational, recognitional, or other unlawful objective. *See, generally*, Morris, *supra*, at 1077-1083. Determination of the union's true objective—its "mental state"—is a question of fact to be decided by the NLRB. *Local 741, United*

*Association (Keith Riggs Plumbing and Heating Contractor)*, 137 NLRB 1125, 1126 (1962). Indeed, if a union falsely claims that the employer fails to pay area standards, the Board will infer an unlawful object and find an unfair labor practice. *Sales Delivery Drivers Local 296 (Alpha Beta Acme Markets, Inc.)*, 205 NLRB 462, 417-474 (1973). Hence, the Union's mental state (object) in picketing Lowe is central to the NLRB's determination of the legitimacy of that picketing under the area standards doctrine.

It is difficult to overstate the significance of the Illinois Appellate Court's decision in terms of its incursion into the Labor Board's exclusive jurisdiction. For example, were a Union to picket an employer during contract negotiations stating on its picket signs that the employer had engaged in bad faith bargaining, the state court would need to apply the entire body of NLRA Section 8(a)(5) decisional law to determine the truth or falsity of the picket sign. Indeed, any form of "unfair labor practice picketing"—picketing to protest alleged violations of federal labor law—would become actionable in state court under the Illinois Appellate Court's rule here. Similarly, if the Union picketed an employer for an alleged failure to honor the provisions of an existing collective bargaining agreement, under the Illinois Appellate Court's rule here the state courts would be required to interpret the agreement to determine whether such an allegation was false—an exercise of judicial authority forbidden the state courts under § 301 preemption. *See, Allis-Chalmers v. Lueck*, 471 U.S. 202 (1985).

The Illinois Appellate Court itself fell into precisely that trap. In its discussion of the facts, the court stated that on August 15, 1989, the Company signed a contract with another union retroactive to April 15, 1988, which "pro-

vided that Lowe would pay wages equal to or higher than others in the area" (A3; slip opinion at 2). That very conclusion required the court to interpret a collective bargaining agreement. To the extent that interpretation serves as a basis for resolving the dispute here (that is, the factual issue of truth or falsity underlying the state law tort claim) it is "inextricably intertwined with consideration of the terms of the labor contract" and therefore preempted by Section 301 of the NLRA. *Allis-Chalmers*, 472 U.S. at 213; *cf.*, *Krasinski v. United Parcel Service*, 124 Ill.2d 500, 530 N.E.2d 468, 471 (1988) (resolution of defamation claim based upon accusation of criminal conduct not dependent upon analysis of contract).

The Illinois Appellate Court recognized the danger to a uniform national labor policy presented by "several separate and distinct tribunals with a diversity of procedures [which] are as sure to produce inconsistent decisions as are different substantive rules of law" (A8; slip opinion at 9). Nevertheless it found the state's interest in protecting its citizens from malicious libels outweighed the federal interest. The Union respectfully submits that this is so only when the resolution of the libel claim turns solely upon state law. Once resolution of that libel claim by the state court requires application of federal law, the federal interest becomes paramount, and the state court's jurisdiction is preempted.

### B. The Alleged Libel To The Company Here Is Not The Sort That Is So Deeply Rooted In Local Feeling As To Preclude Preemption.

In applying the *Linn* exception to the present case, the Illinois Appellate Court also suggested that state court jurisdiction was warranted because matters such as malicious libel are "so deeply rooted in local feeling" (A10-11;

slip opinion at 10-11). The Union argued before the appellate court that the state's interest in protecting its citizens from malicious libels traditionally actionable under the common law is different from its interest here where the allegation is that the Company failed to pay area standards. In rejecting this argument, the appellate court said it found "no authority to support the proposition that the specific content of the untruth is relevant to the *Linn* analysis" (A9; slip opinion at 10). The Union defendants respectfully submit that this too was error.

In *Garmon* this Court expressly based its analysis on the "type of conduct" involved. 359 U.S. at 248. Where the type of conduct constituted "intimidation and threats of violence," it "affected such compelling State interests as to permit the exercise of State jurisdiction." *Linn*, 383 U.S. at 62. Thus, a threat of violence is actionable in state court; a threat to picket in violation of Section 8 of the NLRA is not. *See, Garmon*, 539 U.S. at 245-246. *Linn* itself thus requires analysis of the "specific content" of the alleged untruth.

A close examination of the case law which has addressed the interplay between state defamation law and federal labor policy reveals the unprecedented nature of the Illinois Appellate Court's extension of the *Linn* exception. In *Krasinski*, like *Linn*, the defamation plaintiff had been accused of criminal conduct. So, too, the plaintiffs in all the other cases relied upon by the Illinois Appellate Court alleged harm as the result of traditional, garden-variety defamatory statements: *Fisher v. Illinois Office Supply Co.*, 130 Ill.App.3d 996, 474 N.E.2d 1263, 1264 (3rd Dist. 1984) (plaintiff discharged for allegedly falsely representing the replacement of photo chemicals previously borrowed); *Mays v. Reynolds Metals Co.*, 516 So.2d 517, 518 (Ala.

1987) (plaintiff discharged for alleged arson); *Henderson v. Teamsters Chauffeurs Warehousemen and Helpers Local 313*, 90 Wash.2d 666, 585 P.2d 147 (1978) (rival union politicians allegedly defamed plaintiff by telling his employers he was a "troublemaker"); *Tosti v. Ayik*, 394 Mass. 482, 476 N.E.2d 928, 931 (1985) (plaintiff company foreman accused by union activist of falsifying repair records).

The reputation interest of these individual citizens is qualitatively different from that asserted by the Company here. The state courts have traditionally protected individuals against false claims of criminal conduct and other accusations of dishonesty. In no case, however, has the state court found defamatory allegedly false statements on picket signs that a company was failing to pay area standards. Local feelings of outrage over false claims of theft and lying are simply absent from disputes as esoteric as the one between the Company and the Union here. Neither the method of publication (picketing) nor the content of the message (failure to pay area standards) here are subject to regulation through state defamation law. The Illinois Appellate Court erred in so finding and its decision must be reversed.

## CONCLUSION

For all the above stated reasons, the petitioners, International Union of Operating Engineers, Local 150, and Colin Darling respectfully request the Court to issue a

Writ of Certiorari to the Illinois Appellate Court for the Second District.

Respectfully submitted,

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# APPENDICES

# APPENDIX A

[Filed March 3, 1989]

No. 2-88-1005

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

LOWE EXCAVATING COMPANY,

Plaintiff-Appellant,

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL NO. 150, and ROBERT DARLING,

Defendants-Appellees.

Appeal from the Circuit Court of McHenry County, Illinois.
No. 88 CH 034
Honorable Michael J. Sullivan, Judge, Presiding.

JUSTICE McLAREN delivered the opinion of the court:

Plaintiff appeals from the interlocutory order entered by the circuit court of McHenry County on October 11, 1988. This order denied plaintiff's request for a preliminary injunction due to a finding of Federal preemption of the issues. The trial court held that plaintiff's request for a preliminary injunction enjoining defendants from picketing with placards relating to area standards, when such placards allegedly contained statements which were

knowingly false or made in reckless disregard for the truth, must be denied as this area is preempted by Federal law. We reverse.

Plaintiff, Lowe Excavating Company (Lowe), is an Illinois corporation engaged in excavating and site preparation. Plaintiff entered into a contract with FAMCO Corporation, a general contractor, agreeing to provide labor and services for a Federal housing project known as Canterbury Place. During the fall of 1987, the defendant, International Union of Operating Engineers Local No. 150 (union), attempted to persuade plaintiff to recognize the union for collective bargaining purposes. This attempt failed. On February 15, 1988, plaintiff received a mailgram from the codefendant and business agent for the union, Robert Darling. The mailgram stated that after a careful investigation of plaintiff's policies regarding payment to employees, the union determined that plaintiff was not meeting the area standards on this project. On February 15, 1988, defendant also began picketing the Canterbury Place jobsite carrying placards that stated:

"NOTICE TO THE PUBLIC
LOWE EXCAVATING DOES NOT PAY THE PREVAILING WAGES AND ECONOMIC BENEFITS FOR OPERATING ENGINEERS WHICH ARE STANDARD IN THIS AREA

OUR DISPUTE CONCERNS ONLY SUBSTANDARD WAGES AND BENEFITS PAID BY THIS COMPANY

LOCAL 150
International Union of
Operating Engineers, AFL-CIO"

As a result of the picketing, FAMCO ordered Lowe off the jobsite on February 17, 1988. The defendant ceased picketing at that time.

On March 22, 1988, Lowe employees elected the Congress of Industrial Unions (CIU) as its representative for collective bargaining purposes. The National Labor Relations Board certified CIU as agent, and Lowe and CIU signed a collective bargaining agreement on August 15, 1988. This agreement was made retroactive to April 15, 1988, and provided that Lowe would pay wages equal to or higher than others in the area.

On September 27, 1988, plaintiff received a telegram from defendant reiterating the claims made in the mailgram of February 15. This telegram was limited to a jobsite in Crystal Lake, Illinois, at which the plaintiff was performing excavation and site preparation services. On September 28, 1988, defendant began picketing the Crystal Lake site and also resumed picketing at the Canterbury Place jobsite. The placards displayed by the defendant contained the identical language that appeared during the February picket. As a result of the picketing, Lowe was ordered off the Crystal Lake jobsite.

Plaintiff initially filed a complaint on February 17, 1988, seeking a temporary restraining order, a preliminary injunction, and a permanent injunction enjoining the defendant from engaging in allegedly false picketing at a jobsite where plaintiff was working. Plaintiff also sought damages for tortious interference with prospective economic advantage. On February 18, 1988, defendant filed a petition for removal to Federal district court claiming that plaintiff's complaint seeks redress for an unfair labor practice and therefore exclusive jurisdiction rests with the Federal court. On June 10, 1988, defendant's petition was denied and the case remanded to State court. The Federal court stated that plaintiff's complaint did not on its face contain a Federal claim and therefore the court was without subject matter jurisdiction. This order was not appealed.

Plaintiff filed an amended complaint on July 22 and a second amended complaint on August 4, 1988. Plaintiff's second amended complaint included counts for libel and slander in addition to tortious interference and requested injunctive relief. Defendant filed a motion to dismiss pursuant to section 2-619(a)(1) stating that the court had no subject matter jurisdiction. (Ill. Rev. Stat. 1988, ch. 110, par. 2-619(a)(1).) The lower court granted defendant's motion to dismiss and gave plaintiff leave to amend its complaint.

Plaintiff filed its third amended complaint alleging tortious interference with contractual relations, tortious interference with prospective economic advantage, trade libel and negligent interference with contract. Plaintiff sought both injunctive relief and damages. Defendant again filed a motion to dismiss pursuant to section 2-619(a)(1) stating plaintiff's claims were barred due to the court's lack of jurisdiction. Plaintiff also filed a motion for a temporary restraining order and a preliminary injunction. Plaintiff sought to enjoin the defendant from carrying placards that stated plaintiff did not pay wages consistent with the standards in the area. Plaintiff also sought to enjoin the defendant from communicating to others that Lowe is nonunion. Plaintiff alleged that defendant knew these statements were false. On October 11, 1988, the trial court entered an order denying defendant's motion to dismiss. The court also granted plaintiff's motion for a temporary restraining order in part. The court entered a temporary restraining order prohibiting defendant from disseminating the claim that Lowe was nonunion. However, the court denied plaintiff's request to enjoin defendants from picketing with placards referring to area standards on the basis of Federal preemption. Plaintiff appeals this portion of the court's order.

The sole issue on appeal is whether the National Labor Relations Act (NLRA) deprives a State court of jurisdiction to enjoin a union from picketing with placards that contain knowingly false statements, or statements made in reckless disregard for the truth.

Plaintiff's contention is that the trial court erred in denying its request for a preliminary injunction due to Federal preemption. Generally, the elements which a trial court should consider in deciding whether to issue a preliminary injunction are: (1) the possibility of irreparable harm to the plaintiff's legal rights pending the outcome of trial if the preliminary injunction does not issue; (2) the potential irreparable harm to the defendant's rights if it does; and (3) the plaintiff's likelihood of success on the merits. (*Kanter & Eisenberg v. Madison Associates* (1987), 116 Ill. 2d 506, 510.) On appeal from the grant or denial of a preliminary injunction an appellate court is to consider whether the circuit court abused its sound discretion in evaluating these considerations and granting or denying the preliminary injunction. *Chicago Health Clubs, Inc. v. Picur* (1988), 124 Ill. 2d 1, 7-8.

The issue before this court, however, does not rest on whether the trial court abused its discretion in denying plaintiff's request for an injunction. The trial court found that it was preempted from exercising its discretion and therefore did not analyze the elements set forth above. This court is to determine if this refusal to exercise discretion was proper.

Initially, we note that the issue of preemption was not decided by the Federal district court. Defendant filed a petition for removal on February 18, 1988, claiming that plaintiff's complaint sought redress for an unfair labor practice and therefore jurisdiction rested with the Federal court. Defendant's petition was denied and the case

remanded back to the circuit court. The Federal court concluded that plaintiff's complaint did not on its face state a cause of action under Federal law and therefore the court lacked subject matter jurisdiction. The court did not consider or rule on the question of preemption.

There are two types of Federal preemption over State torts regarding employee/employer or labor relationships. The first type of preemption that pertains to this area is Federal common-law preemption under section 301 of the Labor Management Relations Act (Act). (29 U.S.C. §185(a) (1982).) Section 301 provides:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce * * * may be brought in any district court of the United States having jurisdiction of the parties * * *." (29 U.S.C. §185(a) (1982).)

Federal labor law preempts State tort actions which are " 'substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract.' " (*Allis-Chalmers Corp. v. Lueck* (1985), 471 U.S. 202, 220, 85 L. Ed. 2d 206, 221, 105 S. Ct. 1904, 1916.) The key inquiry is "whether evaluation of the tort claim is inextricably intertwined with consideration of the terms of the labor contract." 471 U.S. at 213, 85 L. Ed. 2d at 216, 105 S. Ct. at 1912.

The case at bar cannot be preempted by section 301 of the Act because there is no labor contract to interpret in this case. The State tort claims in this case are not "substantially dependent upon the analysis of the terms of an agreement made between the parties in a labor contract." Therefore, evaluation of the tort claim cannot be intertwined with the terms of a labor contract. The only

contract in force is the one between Lowe and UIC. That contract is not at issue here. This case is not preempted by Federal case law.

The second type of Federal preemption requires preemption whenever the conduct complained of is "arguably subject" to the jurisdiction of the National Labor Relations Board (NLRB). (See *San Diego Building Trades Council v. Garmon* (1959), 359 U.S. 236, 3 L. Ed. 2d 775, 79 S. Ct. 773.) However, even if the claim involves State torts that are "arguably subject" to the jurisdiction of the NLRB, the court in *Garmon* noted an exception to preemption when the State's interests outweigh any peripheral Federal concern or "where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." *San Diego*, 359 U.S. at 244, 3 L. Ed. 2d at 782, 79 S. Ct. at 779, citing *International Union, U.A.A. & A.I.W. v. Russell* (1958), 356 U.S. 634, 2 L. Ed. 2d 1030, 78 S. Ct. 932.

Defendant argues that area standards picketing is protected under section 7 of the Act. The union also cites authority for the proposition that the area standards protest does not lose protection simply because the employer presents evidence that establishes its labor costs met or exceeded the standard. Since the activity in question is "arguably protected" by the Act, defendant, citing *Garmon*, contends that preemption must apply. This court agrees with defendant and finds this activity is "arguably" protected. However, determining that the activity is arguably protected or prohibited by the Act does not dispose of the issue. We must then look to the exception to preemption set forth by the Supreme Court in *Garmon*.

The exception to preemption, as set forth in *Garmon*, is essentially a balancing of interests. On the one hand we have the Federal interest in establishing a uniform set of rules dealing with labor disputes. On the other hand, we have the interests of the State in protecting its citizens from conduct that it deems harmful or inappropriate. When balancing the competing interests, we look at the risk of State interference with the national labor policy if the State is allowed to adjudicate the matter in controversy. (See *Vaca v. Sipes* (1967), 386 U.S. 171, 180, 17 L. Ed. 2d 842, 852, 87 S. Ct. 903, 911; *Fisher v. Illinois Office Supply Co.* (1984), 130 Ill. App. 3d 996, 1000.) If the risk of interference is minimal and the activity in question is only a peripheral concern of the Act, the matter is not preempted, and the State may proceed, *Garmon*, 359 U.S. at 243-44, 3 L. Ed. 2d at 782, 79 S. Ct. at 778-79.

The United States Supreme Court discussed the Federal interests and stated that:

> "We have necessarily been concerned with the potential conflict of two law-enforcing authorities, with the disharmonies inherent in two systems, one federal the other state, of inconsistent standards of substantive law and differing remedial schemes." (*Garmon*, 359 U.S. at 242, 3 L. Ed. 2d at 782, 79 S. Ct. at 778.)

Several separate and distinct tribunals with a diversity of procedures are as sure to produce inconsistent decisions as are different substantive rules of law. (*Garmon*, 359 U.S. at 243, 3 L. Ed. 2d at 782, 79 S. Ct. at 778, citing *Garner v. Teamsters* (1953), 346 U.S. 485, 490, 491, 98 L. Ed. 228, 239, 240, 74 S. Ct. 161, 165-66.) The State's interests in this matter is to protect its citizens from malicious defamation by others and to redress any injury that may have been caused by this conduct. *Gertz v. Welch*

(1974), 418 U.S. 323, 341, 41 L. Ed. 2d 789, 806, 94 S. Ct. 2997, 3008.

This exception to preemption was also discussed in the case of *Linn v. United Plant Guard Workers of America* (1966), 383 U.S. 53, 15 L. Ed. 2d 582, 86 S. Ct. 657. In *Linn*, the plaintiff was an officer of an employer. The defendant was a union that sought to unionize the employer. Plaintiff filed a complaint alleging that the union published several defamatory remarks during a union organizing campaign. These remarks included statements that plaintiff was "lying" to company employees and had "robbed" them of pay increases. The court stated that while there is considerable leeway with regard to defamatory statements made during labor disputes, even the NLRB does not allow a party to intentionally injure another by publishing defamatory material known to be false. (*Linn*, 383 U.S. at 61, 15 L. Ed. 2d at 588, 86 S. Ct. at 662.) The court found that the State's interest outweighed the Federal concerns and stated that "a State's concern with redressing malicious libel is 'so deeply rooted in local feeling and responsibility' that it fits within the exception specifically carved out by *Garmon*" (*Linn*, 383 U.S. at 62, 15 L. Ed. 2d at 589, 86 S. Ct. at 663), and, therefore, the claim was not preempted.

Defendant argues that *Linn* is distinguishable on the basis of the untruths that were published. Defendant alleges that *Linn* involves statements about "lying" and "robbing," "the stuff of which libel claims are traditionally made." Defendant asserts that since the case at bar deals with untruths involving area standards, the *Linn* rationale does not apply. This court finds no authority to support the proposition that the specific content of the untruth is relevant to the *Linn* analysis.

In *Fisher v. Illinois Office Supply Co.* (1984), 130 Ill. App. 3d 996, the plaintiff alleged that a letter from the employer's agent to the union was defamatory in nature. The court noted that the NLRB would only be peripherally concerned with this type of injury. (130 Ill. App. 3d at 1001.) The State court would be concerned with, *inter alia*, the nature and extent of the injured plaintiff's reputation, the defendant's mental state as it pertains to the possible award of punitive damages and mental pain and suffering. (130 Ill. App. 3d at 1001.) The court did recognize that adjudicating the truth or falsity of the communication may cause some overlap with Federal policy favoring resolution of these matters in arbitration. (130 Ill. App. 3d at 1001.) However, the court held that the matter was not preempted and stated that "the protection of an individual's interest in his reputation is a deep and traditional concern of the State of Illinois." (130 Ill. App. 3d at 1001.) In conclusion, the court stated that "the preemption doctrine should not be used as a shield to protect malicious falsehoods where the State has an overriding interest in protecting its citizens from the damage which these falsehoods inevitably cause." 130 Ill. App. 3d at 1001.

The Illinois Supreme Court has also held that an action in State court for defamation is not preempted by the jurisdiction of the NLRB. (See *Krasinski v. United Parcel Service, Inc.* (1988), 124 Ill. 2d 483.) In *Krasinski*, the plaintiff filed suit alleging wrongful discharge and defamation based on statements indicating he had stolen some equipment. (124 Ill. 2d at 486.) The trial court, asserting Federal preemption, dismissed plaintiff's defamation claim and plaintiff appealed. (124 Ill. 2d at 488.) Defendant argued that plaintiff's claims arose out of unfair labor practices and were, therefore, preempted by the exclusive

jurisdiction of the NLRB. (124 Ill. 2d at 492, 493.) The supreme court indicated that simply because "this claim could arguably be characterized as an unfair labor practice does not require preemption in order to protect the exclusive jurisdiction of the NLRB." (124 Ill. 2d at 493.) The court concluded by discussing the applicability of *Linn* and holding that a State claim for malicious publication of libelous statements during a labor dispute is not preempted by the exclusive jurisdiction of the NLRB. 124 Ill. 2d at 495.

The case at bar fits into the exceptions carved out by the Supreme Court in *Garmon*. The issues in deciding the merits of the case are of only peripheral concern to the NLRB. Defendant contends that the issue presented is whether Lowe was in fact paying area standards. To decide this would force the State court to interpret or enforce the NLRB's area standards doctrine. Defendant states that enforcing the area standards doctrine is of primary importance to the NLRB and, therefore, the exception to preemption does not apply.

The underlying issue in this case is not whether plaintiff paid wages sufficient to meet area standards. The issue is whether defendant, with actual malice, published a statement with knowledge of its falsity, or in reckless disregard for the truth. While truth or falsity is an important element in the tort of trade libel, it is certainly not the only issue to be considered. The issues of injury to reputation and defendant's mental state must also be considered. These issues are of only peripheral concern to the NLRB. The NLRB may be concerned with "area standards," but this concern is outweighed by the State's interest in protecting its citizens from malicious publication of defamatory material. This cause of action fits into the exception carved out by *Garmon*, and, therefore, the State

court is not preempted by the exclusive jurisdiction of the NLRB.

Defendant next contends that the State of Illinois has in force an anti-injunction act that is applicable, and thus the State court cannot enjoin the union from peaceful picketing. (See Ill. Rev. Stat. 1987, ch. 48, par. 2a(1).) This act may or may not apply. That issue is not before this court at this time. The trial court did not reach the question of Illinois law applying to this case. The court ruled that it could not consider these substantive rules due to Federal preemption. Therefore, the question of whether or not the anti-injunction act applies in this case is not ripe for review.

In conclusion, we find that the cases of *Linn* and *Krasinski* are controlling in this matter. We hold that this case falls within the exception to preemption noted by the United States Supreme Court in *Garmon* and is also not preempted by Federal case law. Therefore, we remand this case to the circuit court of McHenry County to review the plaintiff's motion for a preliminary injunction consistent with this opinion.

The judgment of the circuit court of McHenry County is reversed, and the cause is remanded.

Reversed and remanded.

LINDBERG and WOODWARD, JJ., concur.

[Certificate of Clerk omitted in printing]

# APPENDIX B

*(Letterhead Of)*

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

June 1, 1989

Mr. Louis E. Sigman
Baum and Sigman
200 W. Adams St.
Chicago, IL 60606

No. 68477—Lowe Excavating Co., respondent, v. International Union of Operating Engineers, etc., et al., petitioners. Leave to appeal, Appellate Court, Second District.

The Supreme Court today DENIED the petition for appeal as a matter of right or leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on June 23, 1989.

# APPENDIX C

[1] [1] IN THE
NINETEENTH JUDICIAL CIRCUIT
McHENRY COUNTY, ILLINOIS

No. 88 CH 34

LOWE EXCAVATING CO.,

Plaintiff,

vs.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 150, and ROBERT DARLING,

Defendants.

## PRELIMINARY INJUNCTION

REPORT OF PROCEEDINGS had in the above-entitled cause before the Honorable MICHAEL J. SULLIVAN, Judge of said Court, on the 11th day of August, 1988, in the morning session.

APPEARANCES:

ZUKOWSKI, ROGERS, FLOOD & McARDLE
BY: MR. DAVID W. McARDLE
Appeared on behalf of the Plaintiff.

ABRAMSON & FOX
BY: MR. GERARD C. SMETANA
Appeared on behalf of the Plaintiff.

[1] Numbers in brackets refer to the Court Reporter's original pagination of the Transcript of Proceedings.

[2] BAUM & SIGMAN, LTD.
BY: MR. LOUIS E. SIGMAN and
MR. DALE D. PIERSON
Appeared on behalf of the Defendant,
International Union of Operating Engineers,
Local No. 150.

HOLMSTROM & GREEN
BY: MR. R. MARK GUMMERSON
Appeared on behalf of the Defendant,
Robert Darling.

* * * * *

[107] * * * THE COURT: The matter is before the Court on the motion to dismiss. And the Court has heard the [108] arguments, the ruling, and considered the matter. The Court has—will rule on the matter now I think in terms of hearing arguments of counsel and a chance to review these things.

I did look at all the papers I had available to me before this morning. And I don't think it will be any clearer to me than it is right now in terms of the various nuances of federal and state and the various laws.

The two major cases apparently cited by the parties are the Sears Roebuck case and the Lynn vs. United Plant Guard Workers of America and other cases also cited. Under the Lynn-Plant Guard case, the court held that civil actions for libel under state law are not barred if the Plaintiff pleads and proves statements made with malice and resulted with injury. And they indicate on Page 586 of the United States Supreme Court Reports 15 Illinois—or 15 Law Edition 2d: We conclude where either party to a labor dispute circulates false or defamatory statements during a union organization, the court does have jurisdiction to apply state remedies if the complainant pleads and proves that statements were made with malice and injured them.

[109] We also have the issue under the Sears Roebuck case that—and as indicated before and has been cited before—the critical issue, therefore, is not whether the state is enforcing a law relating specifically to labor relations or one of general application, but whether the controversy to the state court is identical to—as in Garner, or different from, as in Farmer, that which could have been but was not presented to the labor board.

It is—then has been talked about the question of the secondary boycott picketing and the prevailing wage type picketing. Now, in the Sears case the court—Supreme Court pointed out that there was a—a distinct issue as to the place of picketing—trespassing—which the state court had a legitimate issue and a right—The state had a right to protect.

We don't have—At least there's been nothing pled with regard to that. It basically relates to the construction or truthfulness of certain language that was being used in picketing.

Now, in the Lynn case the court notes—as has been alluded to before—that epithets such as scab, unfair, liar, are common place in the struggles. Yet the board indicates the decisions would have been [110] different had statements been uttered in actual malice and deliberate intention to falsify or malevolent desire to injure. In sum, the board tolerates intemperate, abusive, inaccurate statements made by the union during attempts to organize, does not interpret the act giving either party license to injure the other party by intentional statements.

Factually in this case there were allegations—and italicized where they allege that the Pinkerton guards were robbed, that the Pinkerton managers were lying.

In the present case the specific language in dispute on the union picket placards was: Notice to the public. Lowe

Excavating does not pay the prevailing wages and economic benefits for operating engineers which are standard in this area. Our dispute concerns only the substandard wages and benefits paid to the area. And also statements with regard to prevailing or substandard wages indicated to other people.

It appears to the Court that while the Court does have jurisdiction—as indicated in the Lynn vs. United Plant Guard—for questions of civil actions and libel under state law, that what the Plaintiff [111] is attempting to do in this case is to cast a preempted dispute into the area of state law by ingrafting state court law on it.

The Court does not believe that the complaint supports that, and I would grant the motion to dismiss.

MR. SMETANA: Would we be able to have leave to amend the complaint, your Honor, correct any deficiency that we may perceive in the complaint?

THE COURT: If you wish leave to amend, I will give you leave to amend.

MR. SMETANA: Thank you.

MR. McARDLE: With regard to the order, then, I would word the order that it is ordered with respect to Defendant's motion to dismiss pursuant to Section 2-619, said motion is granted, and Plaintiff's second amended complaint is dismissed without prejudice. And Plaintiff is given 28 days for leave to file its third amended complaint—if everyone is in agreement?

THE COURT: All right. I will give you leave to do it based upon, you know, the allegations presently contained.

I don't know that you can, but I would give you leave to do so. File it, all right?

MR. SMETANA: Thank you.

# APPENDIX D

IN THE
CIRCUIT COURT OF McHENRY COUNTY, ILLINOIS
COUNTY DEPARTMENT CHANCERY DIVISION

LOWE EXCAVATING CO.,

Plaintiff,

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL NO. 150, AND COLIN DARLING,

Defendants.

No. 88-CH-034—Judge Sullivan

## THIRD AMENDED COMPLAINT FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY AND PERMANENT INJUNCTION AND FOR DAMAGES

NOW COMES plaintiff Lowe Excavating Co. ("Lowe") for its third amended complaint states:

*Parties*

1. Lowe is an Illinois corporation with its principal place of business in Cary, Illinois and is engaged in the business of excavating and site preparation with heavy equipment. Lowe is a signatory to a collective bargaining agreement with the Congress of Independent Unions ("CIU") which pursuant to an NLRB certified election,

represents Lowe's employees. Lowe's rate of pay to construction workers and its fringe benefits equal or exceed the area standards prevailing in McHenry County, Illinois.

2. The International Union of Operating Engineers Local No. 150 ("Local 150") is a labor organization affiliated with the American Federation of Labor-Congress of Industrial Organizations (AFL-CIO) representing employees who operate heavy excavating and earth moving equipment. It does business in McHenry County.

3. Colin ("Bob") Darling ("Darling") is a business agent of Local 150, and a resident of Crystal Lake, Illinois. On information and belief, all of Darling's actions alleged herein were undertaken at the direction and for the benefit of Local 150.

*Nature of the Action*

4. This action is to prevent the defendants from tortiously interfering with Lowe's contracts and prospective economic advantage by soliciting contractors not to do business with Lowe and offering contractors that if they breached contracts with Lowe, defendants would secure other excavation subcontractors to perform the work at or better than Lowe's price; and to recover damages caused not only by the tortious interference but also by defamatory statements uttered concerning Lowe that it was not paying area standards and was "non-union". Because Local 150 is a stranger to Lowe, none of the conduct alleged arises out of a labor dispute. It must be noted that plaintiff in this proceeding seeks no injunctive relief or damages from any strike or picketing that has occurred or is occurring. Rather, relief is sought only for the misstatements made in reckless disregard of the truth and for the purpose of deliberately interfering with plaintiff's contractual relations.

*Background—The FAMCO Picketing*

5. In or about 1986, Lowe entered into a subcontract with FAMCO Corp., a general contractor, for the site preparation, excavation and earth moving work at Canterbury Place, a large retirement community under construction on Illinois Rt. 31 in McHenry County. The subcontract called for Lowe to provide excavation and related services on the project over a period of eight years.

6. During the fall of 1987 and into the winter of 1988, defendant Darling and another Local 150 representative met on several occasions with principals of Lowe to coerce Lowe to enter into a collective bargaining agreement with Local 150. During one of these meetings on October 2, 1987, Darling and other Local 150 representatives had the opportunity to address Lowe's employees face-to-face. Pursuant to these meetings, Darling received information as to the wages and fringe benefits Lowe was paying its employees. This information demonstrated that Lowe's wages were greater than those paid to Local 150 members, and the economic benefits, including the hospitalization plan and profit sharing plan, were superior to those Local 150 afforded its members.

7. Beginning in January 1988, Darling urged Lowe's principals and employees to meet with Local 150's fringe benefit experts and managers at the convenience of Lowe's employees to show that Local 150's benefits were superior. So that all interested persons could attend it was necessary to schedule this meeting on a Saturday. Because Lowe's experts could not be present on February 6 or February 13, 1988 these dates were excluded. Local 150's benefits administrator could not be present on February 20 and February 27, 1988. Because of a Lowe employee's wedding on March 5, the next time that a meet-

ing could be scheduled was March 12, 1988, which was the date to which Darling agreed.

8. On February 12, 1988, Darling caused a Western Union telegram to be read over the telephone to Lowe. On February 15, 1988, Lowe received a Mailgram confirming the telegram, a copy of which is attached as Exhibit A, which stated:

> Local 150, International Union of Operating Engineers is informed that your company is currently performing construction work at Canterbury Place Retirement Community. Local 150 has attempted to make a careful investigation of your company's policies regarding the payment of area standards to individuals performing construction work at this project. We have determined that the area standards for the operating engineers are not being met at this project. If our information regarding this fact is incorrect, please advise us immediately.
>
> Your continued failure to comply with area standards will leave us no alternative but to take necessary lawful action to insure the preservation of area standards.
>
> We do not desire recognition nor do we contend that Local 150 represents employees employed by you. We do not wish you to interpret this as a request for recognition nor do we contend that you are required to employ any members of this local union. Our sole and exclusive purpose is to protect area standards which have been established for operating engineers in this area.
>
> /s/ Bob Darling
> Business Representative
> International Union
> of Operating Engineers
> Local [sic] 150

9. Pickets from Local 150 began picketing the FAMCO jobsite at Canterbury Place on February 15, 1988, carrying placards that stated:

NOTICE TO THE PUBLIC
LOWE EXCAVATING DOES NOT PAY THE PREVAILING WAGES AND ECONOMIC BENEFITS FOR OPERATING ENGINEERS WHICH ARE STANDARD IN THIS AREA

OUR DISPUTE CONCERNS ONLY SUBSTANDARD WAGES AND BENEFITS PAID BY THIS COMPANY

LOCAL 150
International Union of
Operating Engineers, AFL-CIO

10. The placards were intentionally, materially and recklessly false and misleading. Lowe's wages paid to its employees equaled or exceeded the area standards, and the fringe benefits it provided equaled or exceeded those furnished to Local 150's members.

11. Because it had access to Lowe's payroll and fringe benefit records, Local 150 and Darling knew or, in the exercise of reasonable diligence, should have known that the placards were false and misleading.

12. Defendants also knew or, in the exercise of reasonable diligence, should have known that the Canterbury Place project was federally funded and that Lowe was required to pay the prevailing area wage to its employees as a condition of receiving the contract to work.

13. On or about Monday, February 15, 1988, FAMCO's president Bradley D. Brei told Darling that Lowe certified the payment of prevailing wages to the Department of Housing and Urban Development and was therefore paying area standards. Because they would not cross the picket lines, other subcontractors' employees refused to

work at the jobsite and walked off the job. Defendant Darling told Brei in the presence of business agents from the electrical workers union and painters union that only if FAMCO removed Lowe's people and equipment from the job would the pickets be removed.

14. Due to the malicious and untruthful representation that Lowe was not paying area standards, FAMCO succumbed to the defendants' coercion and ordered Lowe removed from performance of Lowe's lawful contract with FAMCO.

15. On February 16, 1988, defendants were informed by Lowe that it was removing all equipment, material and labor from the jobsite.

16. At the time defendants were served with the initial verified complaint in this case, filed on February 17, 1988, they were also presented with a copy of Lowe's certified payroll for the Canterbury Place jobsite and an affidavit of Marshall Lowe as to his payment of area standards.

17. On receipt of the certified payroll, defendants had actual knowledge that Lowe paid its employees equal or better than the prevailing area standards for operating engineers.

18. Lowe was forced to stop working by reason of the false area standards picketing at the Canterbury Place jobsite, causing it substantial injury.

19. Thereafter, a contractor signatory to a contract with defendant Local 150 completed the same excavation contract with FAMCO for which Lowe had a binding contract to render excavation services. On information and belief, Local 150 induced this contractor to complete Lowe's contract at or below Lowe's price.

20. Subsequent to Lowe's removal from the Canterbury Place jobsite, Local 150 sent Lowe additional telegrams contending that Lowe was not paying the area standards at other jobsites without making any inquiry as to the level of wages or benefits Lowe was paying at those jobsites.

*The Union Election and Payment of Area Standards*

21. In March 1988, pursuant to procedures before the National Labor Relations Board, all of Lowe's construction employees held an election to determine their collective bargaining agent. Local 150 decided not to appear on the ballot. On March 22, 1988, Lowe's employees selected the CIU as their agent, and thereafter, Lowe entered into bargaining with the CIU. On March 30, 1988, the CIU was certified as the collective bargaining agent of Lowe's employees.

22. Beginning February 8, 1988, Lowe paid all its employees, regardless of jobsite, the area standards.

23. On August 15, 1988, Lowe and the CIU finalized their agreement, and made it retroactive to April 15, 1988. Pursuant to that agreement, all of Lowe's construction employees are paid the prevailing wages in McHenry County for the crafts that they perform and receive fringe benefits equal to or superior than those prevailing. For instance, each month, Lowe pays $2.20 per hour worked to an employee's fully vested pension plan, and pays the employees directly 17 cents per hour in lieu of payments to an apprenticeship fund and $1.25 per hour in lieu of vacation pay, neither of which constitutes a component of "area standards" under federal law. In addition, the benefits provided under Lowe's health care plan are superior to those provided under the Local 150 plan, and

the aggregate cost of Lowe's health care plan for all construction employees is equal to or exceeds the aggregate cost that Lowe would pay to the Local 150 plan if Local 150 were Lowe's employees' collective bargaining agent.

*Additional Interference*

24. In August or September 1987 Lowe entered into a contract with Crystal Enterprises to perform the excavation and site improvements at the Country Meadows townhouse and condominium development in Crystal Lake, Illinois. This agreement included digging sewer and water trenches and basements for the dwelling units.

25. On or about May 5, 1988, James Sweeney, a Local 150 business agent, met Philip Koop, a principal of Crystal Enterprises, and told Koop that Lowe was non-union despite the fact that the CIU was certified as the collective bargaining agent for Lowe's employees, and was not paying the prevailing wages despite the fact that for three months, Lowe's employees had received the area standards. Sweeney also told Koop that if Crystal Enterprises removed Lowe from its job and refused to do business with Lowe in the future, Local 150 would secure a contractor to do the work at Lowe's price or better.

26. Since this conversation, Lowe has received no further work at Country Meadows, such as hooking up the sewer and water to the individual units. This work has been performed by Bacon & Sons, on information and belief a signatory to a Local 150 contract.

*Local 150's Constructive Knowledge of Lowe's Wage and Benefits Package*

27. On August 11, 1988, this court heard oral argument on the defendants' motion to dismiss Lowe's second

amended complaint in this action. Attached to the pleadings submitted in opposition to that motion were an auditors' comparison of Local 150's benefits and those Lowe was paying as of May 20, 1988. Those comparisons showed that Lowe's wages and benefits were equal to or superior than those that Local 150 members received.

28. Since the hearing on the defendants' motion to dismiss, Local 150 has not made any further inquiry as to Lowe's wages and fringe benefits. Had Local 150 union done so prior to the current picketing and most recent misrepresentation, it would have found that all the objections it lodged to the method of paying the prevailing wage in open court on August 11, 1988 were cured on August 15, 1988 when the collective bargaining agreement with CIU was signed.

*The Recent Interference*

29. On or about August 31, 1988, Lowe's principal received a telephone call from Robert Zolle, a construction superintendent for Erdman Construction Co., a large general contractor from Michigan. Lowe was performing an excavation and site preparation subcontract for Erdman at the Center for Women's Healthcare under construction in Crystal Lake. Zolle told Lowe's principal that he had just received a telephone call from a Local 150 business agent who stated that Lowe was "non-union" and not paying "area standards." The business agent also told Zolle that he would get a union sub-contractor to perform the work at a price lower than Lowe charged Erdman.

30. On September 27, 1988, toward the close of business, a Local 150 business agent caused a Western Union telegram to be read over the telephone to Lowe. The telegram, substantially identical to that sent in February

1988, reiterated that Local 150 had attempted to make a careful investigation of Lowe's policies regarding payment of area standards and had determined that they were not being met. The telegram also indicated that Local 150 neither desired recognition nor contended that it represented a majority of Lowe's employees. The telegram was limited to the Center for Women's Healthcare, Crystal Lake site.

31. At 7:00 a.m. on September 28, 1988, without waiting to receive the telegraphic reply Lowe had sent to Local 150 minutes after he received their telegram informing the union he was in fact paying the area standards, Local 150 began picketing the Erdman construction site and the FAMCO Canterbury Hall construction site carrying placards that stated:

NOTICE TO THE PUBLIC
LOWE EXCAVATING DOES NOT PAY THE PREVAILING WAGES AND ECONOMIC BENEFITS FOR OPERATING ENGINEERS WHICH ARE STANDARD IN THIS AREA

OUR DISPUTE CONCERNS ONLY SUBSTANDARD WAGES AND BENEFITS PAID BY THIS COMPANY

LOCAL 150
International Union of
Operating Engineers, AFL-CIO

32. Fearing that its other sub-contractors would walk off the job because Lowe did not pay area standards, Erdman ordered Lowe off the Erdman jobsite by reason of the false claim that Local 150 has promulgated. In addition, because FAMCO in February had ordered Lowe off the job at Canterbury Hall after other subcontractors walked off, Lowe fears that he will be ordered off this jobsite as well especially since all other trades working for approximately 10 different contractors ceased work as a result of Local 150's false and untruthful picketing.

33. Local 150 knew that Lowe's wages and fringe benefits were equal to or exceeded area standards or recklessly failed to ascertain the truth by not inquiring as to what Lowe had been paying since the August 11, 1988 hearing on the motion to dismiss.

*The Needed for Injunctive Relief*

34. By falsely claiming to general contractors operating in McHenry County that Lowe is "non-union" and does not pay "area standards" and by offering to put "union" contractors on the job at or better than Lowe's price, Local 150 has engaged in a pattern and practice of interfering with Lowe's contracts and prospective business advantage.

35. Lowe has no adequate remedy at law for redress of the defendants' tortious conduct. For instance, money damages will be difficult to compute, and a judgment against a voluntary organization such as a labor organization is difficult to collect given that its only assets are the members' dues which are likely to be insufficient to cover a substantial judgment.

36. Lowe has suffered irreparable harm from the defendants' conduct. Its reputation in the industry as being fair to its employees has been impaired, and its ability to compete for business has been jeopardized. Without being able to compete for new business, Lowe will quickly be forced out of the construction industry.

37. The balance of harms clearly favors Lowe. If this injunction is not granted, Lowe may be forced out of business. If the injunction is granted against Local 150, it will merely be prevented from doing something to which the law ascribes no value, that is interfering with Lowe's ability to do business.

38. Lowe has a reasonable likelihood of success on the merits. Since 1898 Illinois has recognized the tort of interference with contractual relationships or prospective economic advantage, *see Doremus v. Hennessey*, 176 Ill. 608 and Local 150's conduct falls squarely within that which has been found injurious.

39. The public interest will not be harmed by granting the injunction. The public places no value on false statements and a reduction in competition. By contrast, the public places a high value on the right of every person to engage in fair competition by pricing his goods or services according to the dictates of the market.

FIRST CLAIM FOR RELIEF – INJUNCTION

TORTIOUS INTERFERENCE
WITH CONTRACTUAL RELATIONSHIPS

40. Lowe repeats the allegations of ¶¶ 1-39 as if fully set forth.

41. Lowe has valid contracts with FAMCO, Crystal Enterprises and Erdman, that Local 150 knew of. Local 150, with intent to injure Lowe, induced FAMCO, Crystal Enterprises and Erdman to breach these contracts by falsely representing that Lowe was "non-union" and not paying "area standards," by offering to secure the services of a signatory contractor at or below Lowe's price; which inducement was not justified. FAMCO, Crystal Enterprises and Erdman have breached their contracts with Lowe.

42. Lowe has suffered irreparable harm and has no adequate remedy at law.

WHEREFORE, Lowe prays for a temporary restraining order and thereafter a preliminary and permanent injunc-

tion preventing defendant, Local 150 and its agents, from falsely representing that Lowe is "non-union", and that Lowe does not pay "area standards"; from offering to secure the services of a signatory sub-contractor at or below Lowe's price; together with the costs of this action, reasonable attorneys' fees, and such other and further relief as this Court deems just.

SECOND CLAIM FOR RELIEF – DAMAGES

TORTIOUS INTERFERENCE
WITH CONTRACTUAL RELATIONS

43. Lowe repeats the allegations of ¶¶ 1-33 and 41 as if fully set forth.

44. Lowe has been damaged by Local 150's interference with its contractual relationships with FAMCO, Erdman and Crystal Enterprises. For instance, Lowe lost over $100,000 worth of excavation work at Canterbury Place because the threat of pickets and a general walk-off caused FAMCO to order Lowe off the jobsite. Lowe has also lost other work at Crystal Enterprises and Erdman. The amount of Lowe's damages is currently unascertained, but on information and belief, exceeds $25,000. Moreover, because Local 150 caused the breach of contract by means of intentional and malicious false statements of fact, the law perits an award of punitive damages.

WHEREFORE, Lowe prays for judgment against defendants Local 150 and Darling in an amount to be ascertained by the Court, together with punitive damages, the costs of this action, reasonable attorneys' fees and such other and further relief as this Court deems just.

THIRD CLAIM FOR RELIEF – INJUNCTION

TORTIOUS INTERFERENCE WITH
PROSPECTIVE ECONOMIC ADVANTAGE

45. Lowe repeats the allegations of ¶¶ 1-39 as if fully set forth.

46. Lowe has a reasonable expectation of entering into valid business relationships with general contractors doing business in Northern Illinois, including FAMCO, Erdman and Crystal Enterprises. Local 150 and Darling know of this expectancy and have intentionally interfered with it by representing to these general contractors that Lowe is "non-union," and does not pay "area standards," and by offering to secure a "union" sub-contractor who can beat Lowe's price. As a result of the false representations, and solicitations, Lowe has failed to secure the valid business relationships he has sought.

47. Lowe has suffered irreparable injury and has no adequate remedy at law.

WHEREFORE, Lowe prays for a temporary restraining order and thereafter a preliminary and permanent injunction preventing Local 150 from falsely representing to the public at large and other general contractors that Lowe is "non union", and does not pay "area standards"; offering to secure the services of signatory contractors at or below Lowe's price, together with the costs of this action, reasonable attorneys' fees and such other and further relief as this Court deems just.

FOURTH CLAIM FOR RELIEF – DAMAGES

TORTIOUS INTERFERENCE WITH
PROSPECTIVE ECONOMIC ADVANTAGE

48. Lowe repeats the allegations of ¶¶ 1-33 and 46 as if fully set forth.

49. Lowe has suffered money damages by Local 150's interference with its prospective economic advantages. For instance, since Lowe has not done any more work for Crystal Enterprises at Country Meadows, it has lost work worth approximately $10,000. Moreover, because Local 150 caused the interference by means of intentional and malicious false statements of fact, the law permits an award of punitive damages.

WHEREFORE, Lowe prays for judgment against defendants Local 150 and Darling in an amount to be ascertained by the Court, together with punitive damages, the costs of this action, reasonable attorneys' fees and such other and further relief as this court deems just.

## FIFTH CLAIM FOR RELIEF – DAMAGES

## TRADE LIBEL

50. Lowe repeats the allegations of ¶¶ 1-33 as if fully set forth.

51. Local 150 and its agents knew or in the exercise of reasonable diligence should have known that their statements that Lowe was "non-union" and not paying "area standards" were false and misleading. Local 150 and its agents uttered such falsehoods with intent that Lowe be injured and without a privilege to utter them. The law places no value on false statements of fact and provides a remedy to those who have been damaged by them.

52. Lowe has been damaged by the false and misleading statements of fact in low esteem he has been placed by other contractors who were reasonably led to believe that Lowe is not paying area standards and is a "non-union" employer, and by potential employees who would not work for him. The amount of such damage is current-

ly unascertained but on information and belief exceeds $100,000. Moreover, because the false statements were made with malicious intent and were calculated to injure Lowe in its trade or business, the law permits an award of punitive damages.

WHEREFORE, Lowe prays for judgment against the defendants Local 150 and Darling in an amount to be ascertained by this Court, together with punitive damages, the costs of this action, reasonable attorneys' fees, and such other and further relief as this Court deems just.

SIXTH CLAIM FOR RELIEF – DAMAGES

NEGLIGENT INTERFERENCE WITH CONTRACT

54. Lowe repeats the allegations of ¶¶ 1-39 as if fully set forth.

54. Lowe has valid contracts with FAMCO, Crystal Enterprises and Erdman, that Local 150 knew or had reason to know of. Local 150 had a duty to inquire as to Lowe's union status and the payment of "area standards". Local 150 breached that duty by failing to make inquiry and by representing to other contractors and the public that Lowe was "non-union" and did not pay "area standards". Lowe has been damaged by Local 150's negligent failure to inquire by being ordered off the jobsite and not securing additional work from these and other general contractors. The amount of such damage is currently unascertained but on information and belief exceeds $25,000.

WHEREFORE, Lowe prays for judgment against Local 150 and Darling in an amount to be ascertained by the court, together with the costs of this action, reasonable attorneys' fees, and such other and further relief as this court deems just.

LOWE EXCAVATING CO.

By: /s/ GERARD C. SMETANA
One of its attorneys

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[Verification omitted in printing]

# APPENDIX E

## PLAINTIFF'S EXHIBIT A

LOWE EXC
221 W MAIN ST
CARY IL 60013

DUPLICATE OF TELEPHONED TELEGRAM

4-141001U043 02/12/88

LOCAL 150, INTERNATIONAL UNION OF OPERATING ENGINEERS IS INFORMED THAT YOUR COMPANY IS CURRENTLY PERFORMING CONSTRUCTION WORK AT CANTERBURY PLACE RETIREMENT COMMUNITY, LOCAL 150 HAS ATTEMPTED TO MAKE A CAREFUL INVESTIGATION OF YOUR COMPANY'S POLICIES REGARDING THE PAYMENT OF AREA STANDARDS, TO INDIVIDUALS PERFORMING CONSTRUCTION WORK AT THIS PROJECT. WE HAVE DETERMINED THAT THE AREA STANDARDS FOR OPERATING ENGINEERS ARE NOT BEING MET AT THIS PROJECT. IF OUR INFORMATION REGARDING THIS FACT IS INCORRECT, PLEASE INFORM US IMMEDIATELY.

YOUR CONTINUED FAILURE TO COMPLY WITH AREA STANDARDS WILL LEAVE US NO ALTERNATIVE BUT TO TAKE NECESSARY LAWFUL ACTION TO INSURE THE PRESERVATION OF AREA STANDARDS.

WE DO NOT DESIRE RECOGNITION NOR DO WE CONTEND THAT LOCAL 150 REPRESENTS THE EMPLOYEES EMPLOYED BY YOU. WE DO NOT WISH YOU TO INTERPRET THIS AS A REQUEST FOR RECOGNITION NOR DO WE CONTEND THAT YOU ARE REQUIRED TO EMPLOY ANY MEMBERS OF THIS LOCAL UNION. OUR SOLE AND EXCLUSIVE PURPOSE IS TO PROTECT THE AREA STANDARDS WHICH HAVE BEEN ESTABLISHED FOR OPERATING ENGINEERS IN THIS AREA.

BOB DARLING BUSINESS REPRESENTATIVE
INTERNATIONAL UNION OF OPERATING ENGINEERS
LOCAL 150

17:24 EST

MGMCOMP

# APPENDIX F

## STATUTES INVOLVED

Section 7 of the National Labor Relations Act, as amended, 61 Stat. 140, 29 U.S.C. § 157, is as follows:

**§ 157. Right of employees as to organization, collective bargaining, etc.**

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

(July 5, 1935, c. 372, § 7, 49 Stat. 452; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 140.)

Section 8(a) and (b) of the National Labor Relations Act, as amended, 61 Stat. 140, 29 U.S.C. § 158(a)-(b) is as follows:

**§ 158. Unfair labor practices**

**(a) Unfair labor practices by employer**

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pur-

suant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

**(b) Unfair labor practices by labor organization**

It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organiza-

tion or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provision of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

*Provided*, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: *Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit

publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

(5) to require of employees covered by an agreement authorized under subsection (a)(3) of this section the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected;

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed; and

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

> (A) where the employer has lawfully recognized in accordance with this subchapter any other labor organization and a question concerning representation may not appropriately be raised under section 159(c) of this title,

(B) where within the preceding twelve months a valid election under section 159(c) of this title has been conducted, or

(C) where such picketing has been conducted without a petition under section 159(c) of this title being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided*, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 159(c)(1) of this title or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further*, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor labor practice under this subsection.

No. 89-377

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

INTERNATIONAL Union OF OPERATING ENGINEERS, LOCAL 150, AFL-CIO, *and* COLIN DARLING,

*Petitioners,*

v.

LOWE EXCAVATING CO.,

*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND JUDICIAL DISTRICT

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## QUESTION PRESENTED

Whether the court below correctly held in accordance with this Court's prior decision in *Linn v. United Plant Guard Workers, Local 114*, that the state tort of malicious defamation is not preempted by federal law.*

*Lowe Excavating Co. is a closely-held, non-public corporation.

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No. 89-377

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

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INTERNATIONAL UNION OF,
OPERATING ENGINEERS, LOCAL 150,
AFL-CIO, AND COLIN DARLING,

Petitioners,

v.

LOWE EXCAVATING CO.,

Respondent.

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**BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT SECOND JUDICIAL CIRCUIT**

The Respondent, Lowe Excavating Co. ("Lowe"), respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Illinois Appellate Court, Second Judicial District's decision, in this case.

## COUNTERSTATEMENT OF THE CASE

The facts in this case are uncontested and the Appellate court's recitation is correct. Moreover, Respondent's Third Amended Complaint attached to Petitioners' brief at Appendix D, was verified by Marshall Lowe, the president of Lowe Excavating Company. All inferences are resolved to the benefit of the Respondent to demonstrate Petitioners' reckless action in disregard of the truth.

As set out therein, the Petitioners attempted to organize Lowe through the signing of a pre-hire agreement in the Fall of 1987. Having been unsuccessful in accomplishing this result, the union engaged in what it called "area standards" picketing of Lowe at the Canterbury Place federal housing project in McHenry County, Illinois on February 15, 1988. App. D. ¶12. As a result of the allegations of impropriety made by the union on its picket signs, other subcontractors' employees refused to cross the picket line. This resulted in the general contractor, FAMCO, removing Lowe from the project on February 17, 1988, because Petitioner Darling told FAMCO the pickets would not be removed until FAMCO complied. App. D. ¶13. Lowe had an eight year contract for excavating services on the project.

On February 17, 1988, Lowe filed its complaint for temporary restraining order, preliminary and permanent injunctive relief and for damages in state court. Lowe attached a copy of its certified payroll for the Canterbury Place job to the complaint. App. D ¶ 16. The next day, the union removed the case to the federal district court in Chicago, Illinois, alleging, among other things, that Lowe's complaint was preempted by federal law. The district court disagreed, "because Lowe's complaint does not on its

face contain a federal claim" and remanded the case back to state court. Local 150 did not appeal this ruling. A3.[1]

On March 22, 1988, Lowe's employees elected the Congress of Industrial Unions ("CIU") as their bargaining representative. On March 30, 1988, the Board certified the CIU as the collective bargaining agent for these employees. Local 150 chose not to participate in the election. App. D ¶ 21.

On August 15, 1988, Lowe entered into a collective-bargaining agreement with the CIU which required payment of wages and benefits greater than prevailing in McHenry County, and made retroactive to April 15, 1988. App. D ¶ 23. A copy of that contract was provided Local 150 as an exhibit to Lowe's Second Amended Complaint. In addition, Lowe provided Local 150 an independent auditor's comparison of Lowe's wages and benefits with Local 150's union contract. The report concluded that Lowe's wages and benefits were higher than Local 150. App. D ¶ 27.

On August 11, 1988, the Circuit Court heard Respondent's motion for preliminary injunctive relief and Petitioners' motion to dismiss. The Circuit Court granted Petitioners' motion to dismiss, without prejudice, and authorized Respondent to amend its complaint.

On September 27, 1988, Local 150 renewed its picketing of Lowe at a different jobsite, using the same signs previously used in the Spring, and again stating Lowe

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[1]Concurrently, Lowe filed unfair labor practice charges with Region 13 of the National Labor Relations Board on February 17, 1988, alleging unlawful secondary activity by Local 150. The Region found reasonable cause to believe that Local 150 had violated the Act and the union agreed to settle the matter. The agreement did not restrain any false union statements.

did not pay "area standards." Local 150 told Robert Zolle, a construction superintendent for the general contractor Erdman Construction Co. on the Woman's Health Care Center project in Crystal Lake, Illinois, that Lowe was "non-union." App. D ¶29. Erdman removed Lowe from the Job. App. D ¶32. Local 150 also renewed picketing of Lowe at the Canterbury Place project on September 29, 1988.

Lowe filed a verified Third Amended Complaint for Temporary Restraining Order, Preliminary and Permanent Injunction and for Damages in state court on September 29, 1988, C-177, and a motion for TRO, preliminary injunction and reconsideration of dismissal of the Second Amended Complaint on the basis of preemption. C-193. This complaint resulted in the filing of another motion to dismiss by the appellees. C-204.

The trial court initially granted Lowe's motion for a temporary restraining order on October 11, 1988, prohibiting the appellees from "picketing or otherwise disseminating the fact that Lowe is non-union." C-210. Simultaneously, the trial court denied "Respondent's request for preliminary injunctive relief from alleged picketing, with knowingly false placards relating to area standards, in reckless disregard for the truth is denied, based on federal preemption grounds." *Id.*

Lowe appealed and the Illinois Appellate Court reversed. Petitioners filed a request with the Illinois Supreme Court for leave to appeal, but the request was denied on June 1, 1989.

## REASONS WHY THE WRIT SHOULD BE DENIED

### A. The Decision Below Raises No Issues Worthy of Review

The Petitioners allege that the decision below is in conflict with decisions of this Court. Although the matter represents an important issue in the law, careful review of the cases cited as in conflict were discussed at length by the court below. The decision of the Illinois Appellate Court plainly considered and relied upon this Court's decisions in *San Diego Bldg. Trades v. Garmon*, 359 U.S. 236 (1959); *Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53 (1966); and *Farmer v. United Bhd. of Carpenters & Joiners*, 430 U.S. 290 (1977). The decision below does not create or sustain a conflict in the circuits or in any state court.

What is absent from the Petition is the recognition that the Illinois Appellate Court only determined that the tort of malicious defamation is not preempted by federal law based on the fact the union knew of Lowe's wage rates from service upon it of the CIU contract and auditor's report. The Petitioners demonstrated no cases to the court below that the Board would find actionable union defamation under §8(b)(4)(ii), 29 U.S.C. §158(b)(4)(ii). Nothing in the statute makes it an unfair labor practice for a union to engage in defamatory activities with actual knowledge or in reckless disregard of the truth or that those activities independently are coercive actions proscribed by the Act. The provisos to §8(b) only

presume that the truth will be published, but provides no remedy when it is not.[2]

In fact, the Illinois Appellate Court carefully considered each of the Petitioners' arguments since it recognized the federal concern raised by the union and agreed that "the activity in question is 'arguably protected' by the Act." A7. It found, however, that Illinois has an important interest to protect its citizens from malicious defamation and to redress victims of such conduct. A8. That finding alone was not of itself determinative for the appellate court. What was determinative to the Appellate Court, was this Court's ruling in *Linn* that "a State's concern with redressing malicious libel is 'so deeply rooted in local feeling and responsibility' that it fits within the exception specifically carved out in *Garmon*." *Linn*, 383 U.S. at 62; A9.

> Nor should the fact that defamation arises during a labor dispute give the Board exclusive jurisdiction to remedy its consequences. The malicious publication of libelous statements does not in and of itself constitute an unfair labor practice . . . [The Board] looks only to the coercive or misleading nature of the statements rather than their defamatory quality. The injury that the statement might cause to an individual's reputation - whether he be an employer or union official - has no relevance to the Board's function.

*Id.* at 63 (emphasis added).

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[2] 29 U.S.C. §158(b)(4)(i)(ii)(D), states in relevant part:
"Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public...."

29 U.S.C. §8(b)(7)(C), states in relevant part:
"Provided further, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public...."

Area standards picketing also does not in itself provide "umbrella" protection to the union. In *Sears, Roebuck & Co. v. San Diego County Dist. of Carpenters*, 436 U.S. 180, 206 n.42 (1978), the Court shows that in contrast with organizational picketing, area standards picketing is a lesser right; the former "is at the very core of the purpose for which the NLRA was enacted. Area standards picketing, in contrast, has only recently been recognized as a §7 right." Whereas organizational picketing is linked to an employer's workers, "[a]rea standards picketing, on the other hand, has no such vital link to the employees located on the employer's property," *id.*, and therefore it was determined there was little risk to subject trespassory area standards picketing to state jurisdiction.

> While there does exist some risk that state courts will on occasion enjoin a trespass that the Board would have protected, the significance of this risk is minimized by the fact that in the cases in which the argument in favor of protection is the strongest, the union is likely to invoke the Board's jurisdiction and thereby avoid the state forum. Whatever risk of an erroneous state-court adjudication does exist is outweighed by the anomalous consequence of a rule which would deny the employer access to any forum in which to litigate either the trespass issue or the protection issue in those cases in which the disputed conduct is least likely to be protected by §7.

*Sears*, 436 U.S. at 206 (emphasis added).

The trap laid by Petitioners to lure the Court into is that somehow the Labor Board actually finds actionable issues relating to an "area standards doctrine." Pet. at 12. That is not the case here for two reasons.

First, the union initially picketed Lowe at a federally funded jobsite covered by the Davis Bacon Act, 40 U.S.C. §§276a-276a-5, for which the Secretary of Labor determined the wages and benefits prevailing in the

community that were required by law to be paid by all employers on the jobsite to their employees. Pursuant to the law, Lowe certified the payroll of its employees each week to the United States Department of Labor. Since Lowe was required as a minimum to pay the area standard rates determined by the Secretary of Labor to its employees, arithmetic has no part to play in this case. But, the union's allegation that Lowe was not paying area standards implicitly alleged ongoing criminal activity by Lowe, since Lowe was receiving reimbursement by the government contractor for paying the area standard wages and benefits to its workers. See Copeland Anti-Kickback Act, 18 U.S.C. §874; Anti-Kickback Act of 1986, 41 U.S.C. §54.

Second, the Petitioners acquiesced to any right to appeal the determination of the Board's regional directors that its picketing activities were unlawful or that Lowe's state court complaint for damages was an unfair labor practice. Each time the union agreed not to picket Lowe for secondary purposes, the next time Lowe had to show another independent unlawful object, and after each agreement, Petitioners continued to picket untruthfully. But, having been given the opportunity to make their case with the Board or through appeal of the federal district court's decision, the Petitioners cannot say now their actions were inherently lawful.[3] If either of these views of Petitioners' practices were incorrect, they could have

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[3]As the Regional Director of Region 33 of the Board found in his letter of December 1, 1988, the Petitioners had an unlawful recognitional intent "apart from any area standards object which the Union may or may not have had." Ex. to Appellant's Reply Brief.

appealed the findings, but chose instead to settle the two matters with the Board.[4]

Clearly, then, the Board did not find it to be its business to evaluate the truthfulness of the union's area standards publications independently of the Act's requirement that a coercive recognitional or secondary union object be present. If the truth was actionable independently by the Board, the Regional Director would not have noted that Lowe's labor costs were "higher" than Local 150's and treated that question only cumulatively for purposes of finding an unlawful recognitional object in Petitioners' picketing. Otherwise, both Regional Directors of the Board would have treated the truth as a separate unlawful activity and not a peripheral act as it did.

Moreover, the reason the truth is peripheral to the Labor Act is because the Board retains the burden to show a proscribed object under §8(b). None of the Petitioners' cited cases at 12-13 involve issues of untruthful or reckless picketing. In fact, the issue in those Board cases was whether area standards picketing by itself implicitly contains an unlawful "object" and therefore should be illegal per se. In *Local 107, Int'l Hod-Carriers (Texarkana Constr. Co.)*, 138 N.L.R.B. 102 (1962), two Board Members, Rogers and Leedom, dissented because the Board found area standards picketing not of itself to contain an unlawful object. Ten years later, in *Delivery*

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[4]Although the Board was obliged to reassert its March 1988 § 8(b) findings against the union again at this juncture, it provided no remedy or damages incurred by Lowe because of the untruthful picketing. *National Union of Hosp. Employees*, 345 N.L.R.B. 105 (1979); *Scott v. Moore*, 680 F.2d 979, 996 n.13 (Former 5th Cir. 1982) (en banc). "The Board can award no damages, impose no penalty, or give any other relief to the defamed individual," *Linn*, 383 U.S. at 63; *see also Bill Johnson's Restaurants, Inc.*, 290 N.L.R.B. No. 155, 129 L.R.R.M. 1105 (1988), discussed infra.

*Drivers Local 296 (Alpha Beta Markets, Inc.)*, 205 N.L.R.B. 462 (1973), the Board specifically stated that whether or not area standards picketing should be illegal per se under the Act is best left to Congress.

Consequently, the Board will only find area standards picketing to be a pretext for organizational or secondary purposes where there is an admission or a violation of the Board's *Moore Drydock* standards. The mere fact of defamatory picketing does not substitute for the Board's burden of proof. And if Lowe's complaint here violated some union right, the union could have been expected to file its own unfair labor practice charge, which it did not.[5]

The Appellate Court correctly proceeded to hold that the Petitioner's argument that union untruths involving area standards are no different from the publication of other untruths. Petitioners provided "no authority to support the proposition that the specific content of the untruth is relevant to the *Linn* analysis." A9. The court below also made the correct determination that the matter at issue is not whether Lowe in fact "paid wages sufficient to meet area standards. The issue is whether defendant, with actual malice, published a statement with knowledge of its falsity, or in reckless disregard for the truth." A11.

> [The Board] looks only to the coercive or misleading nature of the statements rather than their defamatory quality. The injury that the statement might cause to an individual's reputation - whether he be an employer or union official - has no relevance to the Board's function. Cf. *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U.S. 261, 60 S.Ct. 561, 84 L.Ed. 738 (1940).

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[5] "[I]t may be expected that the injured party will request both administrative and judicial relief. The Board would not be ignored since its sanctions alone can adjust the equilibrium disturbed by an unfair labor practice." *Linn*, 383 U.S. at 66.

*Id.* at 63 (emphasis added).

There is nothing the state court could decide in this case that will upset the balance in the law since truthfulness does not directly concern the Board's supervisory mission. Even if the state court concludes the truthfulness question erroneously, *see Sears*, *supra*, since truth is only a collateral issue to finding an "object" required for intervention of the Board under §8, the balance will not be upset.[6]

These issues are plainly not ones to be entertained by the Board within its unfair labor practice jurisdiction. Respondent agrees with Petitioners that this case raises an important issue because the Board does not afford any remedy for untruthfulness. The reason the issue is important to Petitioners is because they view the Act as permitting picketing with impunity in order to pressure

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[6]Even if the trial court is required to consider the Board's "area standards doctrine" as the defendants allege, this is not an unacceptable risk of a prohibited inquiry, as explained in *Sears*, 436 U.S. at 188 n.13:

> The Court's rejection of an inflexible preemption approach is reflected in other situations as well. Where only a minor aspect of the controversy presented to the state court is arguably within the regulatory jurisdiction of the Labor Board, the Court has indicated that the Garmon rule should not be read to require pre-emption of state jurisdiction. *Hanna Mining Co. v. Marine Engineers*, 382 U.S. 181, 86 S. Ct. 327, 15 L.Ed.2d 254. The Court has also indicated that if the state court can ascertain the actual legal significance of particular conduct under federal law by reference to "compelling precedent applied to essentially undisputed facts," *San Diego Building Trades Council v. Garmon*, 359 U.S., at 246, 79 S. Ct., at 780, the court may properly do so and proceed to adjudicate the state cause of action. Permitting the state court to proceed under these circumstances deprives the litigant of the argument that the Board should reverse its position, or, perhaps, that precedent is not as compelling as one adversary contends.

non-signatory employers with the signal effect of causing work stoppages. Yet, in the present case, without specific evidence of an inquiry into the facts and acknowledgement the Petitioners were in possession of Lowe's collective-bargaining agreement, Petitioners untruthful picketing was held not preempted on its face and it must be actionable.

Although this case involves the decision of only one state court, if the Court agrees with the Respondent's analysis under the narrow circumstances raised here, the writ of certiorari should be denied. But, if the Court might believe that it is not self-evident that all defamatory activities, including picketing, are not in fact preempted, then the Court should grant the writ to demonstrate no exclusive federal jurisdiction exists in the circumstances and so affirm the holding below so that it can be applied to the benefit of other small contractors nationwide.

**B. This Court's Prior Decisions Are Controlling**

Like *Linn*, Lowe's defamation count lacks any substantial federal question for resolution. Lowe pled that the "placards were intentionally, materially, and recklessly false and misleading" or "in the exercise of reasonable diligence" the union should have known so. Complaint, ¶¶ 10, 11; A22.

In *Linn*, the Court also "conclude[d] that where either party to a labor dispute circulates false and defamatory statements during a union organizing campaign, the court does have jurisdiction to apply state remedies if the complainant pleads and proves that the statements were made with malice and injured him." 383 U.S. at 55. In that context, the Court noted that the Board does not police "propaganda used in elections," *id.* at 60, and by intentionally "circulating defamatory or insultory material known to be false...the one issuing such material forfeits his protection under the Act." *Id.* at 61 (citation omitted).

The state court in defamation actions will also not be injecting itself into the "merits of a labor controversy," *Linn*, 383 U.S. at 64, because redress of "defamation actions preserved in *Linn*...can be adjudged without regard to the merits of the underlying labor controversy." *Farmer*, 430 U.S. at 299-300. The Illinois Appellate Court's precise formulation coincides with this analysis, that "[t]he issue is whether defendant, with actual malice, published a statement with knowledge of its falsity, or in reckless disregard for the truth." A11. This is the same limitation set out in *Linn* to "guard[] against abuse of libel actions and unwarranted intrusion upon free discussion envisioned in the Act." 383 U.S. at 65.

The Board's amorphous "area-standards" doctrine and its purpose raised by Petitioners, is not in issue. "After all, the labor movement has grown up and must assume ordinary responsibilities. The malicious utterance of defamatory statements in any form cannot be condoned, and unions should adopt procedures calculated to prevent such abuses." 383 U.S. at 63. Whether Petitioners had those procedures in place will surely assist the trial court in deciding whether Petitioners' actions might have been reckless.

These cases demonstrate the approach to preemption is not rigid under *Garmon*, but flexible. *Sears*, 436 U.S. at 188 n.13. Accordingly, there is no law to be reconciled by granting the writ.

**C. The State Court Defamation Action is Unrelated to the Board's Remedies as Already Determined by the Board.**

In *United Constr. Workers v. Laburnum Constr. Corp.*, 347 U.S. 656, 665 (1954), the Court explained, that "[t]o the extent that Congress prescribed preventive procedures against unfair labor practices, [this Court] recognized that

the Act excluded conflicting state procedure to the same end," but that where no congressional remedial scheme existed "there is no ground for concluding that existing criminal penalties or liabilities for tortious conduct have been eliminated."

In *San Diego Bldg. Trades Council v. Garmon*, 353 U.S. 26 (1957), the Court demonstrated that activity arguably within section 7 or 8 of the NLRA is preempted, but that "compelling state interests" were not overridden. In *Sears, Roebuck & Co. v. San Diego County Dist. of Carpenters*, 436 U.S. 180 (1978), the Court applied the concept to uphold a state court injunction which precluded the union's tortious picketing activity. Although the Court thought the conduct "was arguably prohibited and arguably protected by federal law," it was permissible for the state court to restrain the location of the picketing. *Id.* at 198.

It is also clear that Lowe is not requesting as its remedy the cessation of all picketing by Petitioners. Only untruthful picketing does Lowe believe should be restrained in order to vindicate Lowe's interest in its reputation.

The National Labor Relations Board in *Bill Johnson's Restaurants, Inc.*, 290 N.L.R.B. No. 155, 129 L.R.R.M. (BNA) 1105 (1988), *on remand from*, *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983), has unequivocally ruled that it will not consider and remedy state defamation claims because it does not have the expertise to evaluate state tort law or the extra resources to do so. 129 L.R.R.M. at 1108.

In that case, this Court had held that the preemption doctrine, citing *Sears*, *Linn*, and *Laburnum Constr. Corp.*, cannot bar the employer's "right to seek local judicial protection from tortious conduct during a labor dispute." 461 U.S. at 742.

> In *Linn v. Plant Guard Workers*, supra, at 65, we held that an employer can properly recover damages in a tort action arising out of a labor dispute if it can prove malice and actual injury. *See also Farmer v. Carpenters*, *supra*, at 306. If the Board is allowed to enjoin the prosecution of a well-grounded state lawsuit, it necessarily follows that any state plaintiff subject to such an injunction will be totally deprived of a remedy for an actual injury, since the "Board can award no damages, impose no penalty, or give any other relief" to the plaintiff. *Linn*, *supra*, at 63. Thus, to the extent the Board asserts the right to declare the filing of a meritorious suit to be a violation of the Act, it runs headlong into the basic rationale of *Linn*, *Farmer*, and other cases in which we declined to infer a congressional intent to ignore the substantial state interest "in protecting the health and well-being of its citizens." *Farmer*, *supra*, at 302-303. *See also Sears, Roebuck & Co. v. Carpenters*, *supra*, at 196; *Linn*, *supra*, at 61.

*Id.*

The Board in its decision on remand has openly proclaimed that it will refuse to hear the merits of any libel claim.

> We next address the General Counsel's alternative contention that as the state court has been precluded from deciding the merits of the libel claim, we should now do so . . . Nonetheless, we decline the General Counsel's invitation to enter that thicket. Our expertise lies in resolving labor law questions that arise under the Act, rather than deciding claims that arise under state law. Moreover, our limited resources do not permit us to engage in the resolution of state law claims.

129 L.R.R.M. (BNA) at 1108.

> Conversely, our decision not to decide these state law claims provides the parties in future cases with the necessary guidance to aid their resolution of those cases.

*Id.* at n.16 (emphasis added).

Accordingly, the National Labor Relations Board, like the federal court earlier in the case at bar, expressly stated it will not hear matters concerning libel arising out of state law or that it is required to "decide the state court suit." 129 L.R.R.M. at 1108 n.14. How the Board's "area standards doctrine" is adversely affected by the Board's expressly stated refusal to consider libel questions is not explained by Petitioners. Neither do they explain what interest of the Board will be vindicated by resolution of state torts, that is, what section of the Act is affected or arguably provides an unrestrained right to publish defamatory statements. Since none are present, no important labor law interests can be affected by granting the writ.

## CONCLUSION

For the reasons set out above, the Court should deny Petitioners' request for a writ of certiorari to the Appellate Court of Illinois, Second Judicial District.

Respectfully submitted,

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